Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1996

THE PHILLIPS COMPANY, a Colorado Limited Partnership,

Petitioner,

v.

SOUTHERN PACIFIC RAIL CORPORATION, a Delaware Corporation and THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC., a Delaware Corporation,

Respondent.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Courts are clothed with authority, under 43 U.S.C. §912, to adjudicate abandonments of railroad rights of way granted under the General Railway Act of 1875 (18 Stat. 482), absent prior issuance of abandonment authority by the Surface Transportation Board (or its predecessor, the Interstate Commerce Commission), acting pursuant to 49 U.S.C. §10903?

2. Whether the decision of the Tenth Circuit Court of Appeals in this case can be reconciled with the holding of the Court of Appeals for the Federal Circuit in *Preseault v. United States, 65 USLW 2330, 100 F.3d 1525 (Fed. Cir. November 4, 1996)?*

LIST OF PARTIES

The caption contains the names of all the parties to this proceeding. Petitioner The Phillips Company is a Colorado Limited Partnership by which a 70 acre ranch in the Roaring Fork Valley is held by the three adult offspring of C.V. and Ellamae Phillips, who bought the ranch from original homesteaders in 1934. When litigation commenced in 1993 the rail line was owned by the Denver & Rio Grande Western Railroad Company, Inc.. Southern Pacific subsequently acquired the Denver & Rio Grande. In September, 1996, Southern Pacific's parent, the Southern Pacific Transportation Company, Inc., was merged with the Union Pacific Rail Corporation. Petitioner is unsure as to whether the rail line in question has now been merged into the Union Pacific or is still retained as an asset of the Southern Pacific Rail Corporation.

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Athearn, Robert G., THE DENVER AND RIO GRANDE WESTERN RAILROAD, University of Nebraska Press, 1962, (ISBN 0-8032-5861-5) 2

PETITION FOR A WRIT OF CERTIORARI

The Phillips Company petitions the Court to issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit, entered October 16, 1996.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 97 F.3d 1375 (10th Cir. 1996) and is reproduced in the Appendix to this Petition. The decision of the United States District Court for the District of Colorado is reported at 902 F.Supp. 1310 (D. Colo. 1995) and is reproduced in the Appendix to this Petition, together with the decision of the Interstate Commerce Commission in Finance Docket No. 32518, which was appended to the District Court's decision. The Interstate Commerce Commission proceeding was undertaken pursuant to a referral to the I.C.C. by the District Court under 28 U.S.C. §1336(b). The text of 49 U.S.C. §912 is also found in the Appendix.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit entered on October 16, 1996. The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "Nor shall private property be taken for public use, without just compensation."

The following statutes are also involved in disposition of this Petition:

General Railway Act of 1875 (18 Stat. 482); The Act providing for reversion of abandoned 1875 Act rights of way to adjoining 1875 Act landowners, 43 U.S.C. §912; That part of the Interstate Commerce Act (as amended) vesting jurisdiction of railroad abandonments in the Surface Transportation Board, 49 U.S.C. §10903; Federal Rails to Trails legislation, 16 U.S.C. §1247(d) and 16 U.S.C. §1248(c).

STATEMENT OF THE CASE

The Phillips family has owned a ranch adjoining the Aspen Branch of what has been known historically as the Denver & Rio Grande Railroad since 1934. No rail traffic has been operated over the branch (which runs from Glenwood Springs to Aspen, Colorado) since 1980. The Aspen Branch has been listed in I.C.C. schedule filings as

being out of service. The railroad has contracted to sell the branch line to a consortium of local governments known as the Roaring Fork Railroad Holding Authority. That transaction, which has been challenged by the Phillips Company and other adjoining landowners in a state court filing, (subsequently removed by the Southern Pacific on Federal Question grounds to the U.S. District Court at Denver and now docketed there as civil Action No. 97-Z-176), has not closed.

In 1993 the Phillips Company filed an action in the Federal District Court at Denver for a declaratory judgment that the Aspen Branch of the D&RGW was abandoned within the meaning of 43 U.S.C. §912 prior to the October 4, 1988 effective date of Federal Rails to Trails legislation (16 U.S.C. §1247(d) and 16 U.S.C. 1248(c) and that the Phillips Company therefore owned the reversion. The District Court referred the abandonment issue to the Interstate Commerce Commission. The District Court also allowed amendment of the initial Complaint in order to allege a class action, embracing a 19 mile stretch of right of way from near Carbondale, Colorado south to Woody Creek, Colorado. (Woody Creek is 8 miles northwest of Aspen.)

The Phillips Company commenced an adverse abandonment proceeding in the I.C.C.. At the suggestion of the respondent railroad, the I.C.C. converted the matter to a Declaratory Order case, then ruled that because a ruling was sought of abandonment prior to October, 1988, and since the I.C.C. had not ever authorized abandonment under

49 U.S.C. §10903, the line could not be legally determined to be abandoned on or prior to the effective date of Federal Rails to Trails legislation. Accordingly, the I.C.C. determined that since no abandonment had ever been authorized (other than for an 8 mile sector of the branch lying south of the Phillips property, which was abandoned and transferred to the County government in 1969), the line could not be determined to be abandoned.

The railroad respondents, the District Court and Tenth Circuit have assumed that the Congress' 1980's Rails to Trails enactments have transferred rights to abandoned 1875 Act rights of way to the United States under 16 U.S.C. §1247(d) and 16 U.S.C. §1248(c).

After the I.C.C. decision (which is an appendix to the District Court grant of Summary Judgment for the railroad), the District Court allowed granted Summary Judgment to the railroad, but opined the Phillips Company could revisit the I.C.C. with an application for prospective abandonment authority. The Phillips Company, joined by other adjacent landowners, has petitioned the Surface Transportation Board to reopen its 1994 filing and issue a prospective determination that the line is abandoned. The respondents have opposed that filing on both procedural and substantive grounds.

Neither the I.C.C., nor its successor, the Surface Transportation Board, nor the District Court, has adjudicated facts relating to whether the line is now, or was in the past, abandoned within the meaning of either 43

U.S.C. §912 or 49 U.S.C. §10903.[1]

Evidence presented to the District Court included an August, 1994 feasibility study prepared by a railroad consultant (one James Ozment) indicating 50 to 70 percent of the ties and essentially all of the ballast between Carbondale and Woody Creek would need replacement in order for the line to be reopened. That report raised unanswered questions about viability of bridges to carry rail traffic. A Colorado Department of Transportation study, dated January, 1995, put the cost of such rehabilitation at a price running to tens of millions of dollars. The Ozment report also indicated that a fiber optic cable installation a few inches to side of, and about 18 inches below, the rails of the defunct line, had compromised the roadbed.

The Record on Appeal in the Tenth Circuit contains abundant factual development regarding the physical condition of the Aspen Branch right of way, the latest date or dates on which rail service was provided over the line and the extent to which, if at all, any potential shippers were impacted. On July 16, 1993, the District Court granted a Temporary Restraining Order against any physical disturbance of evidence, such as landslides and washouts. At that time, the District Court found it probable that The Phillips Company would prevail on the merits with respect to abandonment. Evidence in the Record on Appeal includes color photographs showing landslides. The Record also includes engineering reports, Colorado Department of Transportation analyses and feasibility studies and an affidavit of an expert in analysis of aerial photographs, opining that a landslide is seen across the tracks by the mid 1980's.

The recent state court filing recites that in 1991 the D&RGW leased a fiber optic cable easement to a company named Qwest Communications. The contemplated sale of the Aspen Branch right of way to the local rail holding authority is subject to the rights of continued fiber cable communications operation by Qwest Communications and the revenue stream from such fiber cable operations being paid to Southern Pacific.

The fact of the fiber optic cable easement lease (which Petitioner regards as being incompatible with resumption of rail service on any basis) was not disclosed in the District Court or I.C.C. proceedings. In the I.C.C., the railroad filed a September, 1994 affidavit from its consultant, Mr. Ozment, saying rail service could be reestablished for about $30,000. That affidavit was noted by the I.C.C. in its 1995 Declaratory Order on behalf of the railroad. The I.C.C. declined to consider (as being untimely filed) a submission by Petitioner quoting from Mr. Ozment's August, 1994 CDOT report in which he described the magnitude of work needed for restoration of service (the ties, the ballast, the bridges)[2]

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2 While the rails, tie plates and ties have not been removed from the Aspen Branch, so as to make the physical facts of this case exactly analogous to the facts of the Preseault case (where rails were actually removed in 1975), the procedural facts (lack of I.C.C. authorization for abandonment) are analogous. Furthermore, the physical facts here, including the installation of a fiber optic cable line which is incompatible with resumption of rail service, support a finding such as that made by the District

REASONS FOR GRANTING THE WRIT

The Phillips case captures the entire historic sweep of railroading in the West. It starts with a rail line constructed in the Aspen Silver Boom of 1887 under the aegis of the General Railway Act of 1875 (as have been virtually all Western lines).[3] The line was used for many years, but fell into disuse by 1980, as the economy of the Roaring Fork Valley shifted from mining and ranching to recreation.

Today the Aspen Branch has been subject to the wave of mergers by which the West has been left with essentially two rail systems (the Union Pacific, made up of the former Union Pacific, Southern Pacific, Rock Island,

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Court in granting the July, 1993 Temporary Restraining Order, that it is probable the Phillips Company will prevail on the physical issue of abandonment. While the railroad's affidavits in the I.C.C. claimed some activity on the line into the 1980's, CDOT's studies documented no rail service after 1980.

[3] *Athearn, Robert G., THE DENVER AND RIO GRANDE WESTERN RAILROAD, University of Nebraska Press, 1962, (ISBN 0-8032-5861-5) is the definitive history of the Rio Grande Railroad. The late Professor Athearn put the percentage of the entire D&RGW system acquired under the 1875 Act at over 75 percent. Professor Athearn's writing on Western railroads (specifically, the Union Pacific) is cited with approval in Justice Rehnquist's opinion in LEO SHEEP CO. V. UNITED STATES, 440 U.S. 668, 59 L.Ed.2d 677, 99 S.Ct. 1403 (1979).*

Chicago and Northwestern and Denver & Rio Grande systems; and the Burlington Northern Santa Fe, made up of the former Burlington, Northern Pacific, Great Northern and Santa Fe systems).

The Aspen Branch is now carrying modern telecommunications traffic and is being sold off as a non-rail asset of a giant rail conglomerate. It no longer carries rail traffic. The local railroad holding authority plans to make it a bike trail while rail-banking it for potential future rail use.[4]

The Phillips case typifies the circumstances which will face hundreds of not thousands of other adjoining landowners to abandoned rights of way.[5] Unless this Court grants certiorari and resolves the tension between the rail abandonment/reversion provisions of 43 U.S.C. §912 and the Surface Transportation Board's competence under 49

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[4] *Southern Pacific's Forms 10K placed in evidence in the District Court (to support the amendment to make the Phillips case a class action) indicated S.P. enjoyed hundreds of millions of dollars in annual income from sale of abandoned or unused rights of way. One such, sale, in Southern California, netted over $300 million, according to S.P.'s S.E.C. filings.*

[5] *The Union Pacific-Southern Pacific and Burlington Northern-Santa Fe mergers will result, based on S.E.C. filings, in about 4,000 miles of abandoned rights of way. Professor Athearn's ratio would mean about 3,000 miles of that quantum would be on U.S. grant land under the 1875 Act, with potential reversionary rights lying in either the United States or adjoining landowners.*

U.S.C. §10903, adjoining landowners face insurmountable regulatory and judicial complexity in dealing with either their rights or their remedies.

The cost to adjoining landowners of mounting adverse abandonment proceedings in the Surface Transportation Board is prohibitive. The Surf Board's docket fee for such a proceeding is $11,000.00.[6]

Adjoining landowners must also cope with whether they are ultimately going to try to obtain reversions (whether by state law, as in the *Preseault* case, or by statutory right under the 1875 Act) or are going to be compensated for takings of their reversionary rights, as sanctioned by this Court in *Preseault* in 1990 and as established in the Federal Circuit's recent *Preseault* decision.[7]

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[6] *Paradoxically, if an S.T.B. proceeding is brought by or on behalf of a railroad, the railroad can short-circuit most of the Surf Board's procedures and costs under 49 C.F.R. §1152.50, which provides an abbreviated procedure for lines (such as the Aspen Branch) which have been out of service for two or more years. A filing seeking to utilize the summary out of service filing procedure was attempted by this writer on behalf of another landowner adjacent to the Aspen Branch. At the Respondent railroad's suggestion, it was rejected on procedural grounds because the landowner was not a railroad.*

[7] *Preseault v. United States, 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) recognized a potential right to compensation. The explication of such rights in the Federal Circuit's recent Preseault decision, reported at 100 F.3d 1525 (Fed. Cir. November 4, 1996) cannot be reconciled with the Tenth Circuit's decision in this case.*

The Court of Appeals and District Court both turned Phillips on administrative law points, holding that once the agency (the I.C.C.) had interpreted its own authorizing statute to confer plenary jurisdiction on the agency, there was nothing more for the courts to do but yield to the agency.

That rationale utterly fails to deal with the hopeless complexity which then results for adjoining landowners. To vindicate their rights, whether under the 1875 Act or under state law, they will be compelled to commence adverse abandonment proceedings in the Surface Transportation Board.

Furthermore, with the Federal courthouse door closed, such landowners will have absolutely no mechanism for protection of their reversionary rights against deals in the making by railroads (such as the Southern Pacific's pending sale of the Aspen Branch to the local holding authority).

The classic method of protection is to files Notices of Lis Pendens. But the text writers agree that the laws of most states do not make lis pendens procedures available except when *court* actions are filed affecting land title. Statutes such as Colorado's prohibition against improperly clouding land titles (C.R.S. 1973 §38-35-109(3)) are typical and only the bravest or most foolhardy practitioner would recommend filing a Notice of Lis Pendens based on a mere Surface Transportation Board filing.

The Federal Circuit's decision in *Preseault* cannot be

reconciled with the Tenth Circuit's ruling in this case. In *Preseault* there is elegant simplicity. If a trails conversion is effected, the landowner can file for compensation in the Court of Federal Claims and expect to be paid. In *Phillips*, there is nothing to do but seek adverse abandonment authority from a hostile Surface Transportation Board. While that proceeding is pending the landowner is completely vulnerable to dealing by the railroad's management, which has a fiduciary duty to shareholders to maximize profit by trying to deal the unused right of way to the highest bidder. Furthermore, such an 1875 Act adjoining landowner faces specific language in Rails to Trails legislation providing that such a conversion is not an abandonment.

Only if this Court resolves the tension between 43 U.S.C. §912 and 49 U.S.C. §10903, and harmonizes the decisions of the Federal Circuit in *Preseault* with the Tenth Circuit in *Phillips*, can railroads and adjoining landowners have any certainty about how to deal with the problems of abandoned rights of way.

Particularly in the West, where thousands of miles of 1875 Act rights of way are now headed for abandonment, is the problem of this conundrum in need of Supreme Court resolution.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

The Phillips Company, Plaintiff-Counter-Defendant-Appellant,

v.

The DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware corporation; Southern Pacific Rail Corporation, a Delaware corporation, Defendants-Counter-Claimants-Appellees,

The Surface Transportation Board, Amicus Curiae.

No. 95-1412.

United States Court of Appeals,

Tenth Circuit.

Oct. 16, 1996.

97 F.3d 1375 (10th Cir. 1996)

Owner of land adjacent to portion of railroad line sued railroad company, seeking to quiet title to right of way underlying rail line. The United States District Court for the District of Colorado, Zita L. Weinshienk, J., 902 F.Supp. 1310, granted companies' motion for judgment on pleadings. Landowner appealed. The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that abandonment could not occur without prior authorization by Interstate Commerce Commission (ICC).

Affirmed.

[1] COMMERCE k85.6
83k85.6
Authorization from Interstate Commerce Commission (ICC) to abandon railroad line is prerequisite to court's determination that railroad has abandoned right-of-way, for purposes of statute governing disposition of abandoned railroad grants. 43 U.S.C.A. § 912; 49 U.S.C.A. § 10903.

[2] COMMERCE k85.6
83k85.6
Interstate Commerce Commission's (ICC) exemption from formal abandonment procedures, available for railroad lines that have been out of service for more than two years, is available only to railroads, and is not self-executing. 43 U.S.C.A. § 912; 49 U.S.C.A. § 10903; 49 C.F.R. § 1152.50.

***1376** George M. Allen, Telluride, CO, for Plaintiff-Counter-Defendant- Appellant.

John R. Webb, Holme Roberts & Owen LLC, Denver, CO, for Defendants-Counter- Claimants-Appellees.

Henri F. Rush, General Counsel, Louis Mackall, V, Interstate Commerce Commission, Washington, DC, for Amicus Curiae The Surface Transportation Board.

Before ANDERSON, LOGAN, and MURPHY, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

[1] The issue presented by this appeal [FN1] is whether authorization from the Interstate Commerce Commission (ICC) [FN2] to abandon a railroad line, see 49

U.S.C. § 10903, is a prerequisite to a court's determination that the railroad has abandoned the right of way for purposes of 43 U.S.C. § 912. In light of the reasonableness of the ICC's determination that its authorization under § 10903 is a prerequisite to § 912 abandonment, we affirm. [FN3]

FN1. After examining the briefs and appellate record, and after fully considering appellant's request for oral argument, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

FN2. On January 1, 1996, the functions of the ICC were transferred to the Department of Transportation's Surface Transportation Board. See CSX Transp., Inc. v. Surface Transp. Bd., 75 F.3d 696, 697 (D.C.Cir.1996)(citing ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995)). Because the ICC was the pertinent administrative entity throughout these proceedings, we will continue to refer only to the ICC in this decision.

FN3. In light of the district court's order dated July 23, 1996, dismissing defendants' counterclaim, we now have jurisdiction to consider this appeal under 28 U.S.C. § 1291.

Plaintiff, a Colorado limited partnership owning land adjacent to a portion of defendants' Aspen Branch railroad line, commenced this action under § 912, seeking to quiet title to the right of way underlying the adjacent rail line in

itself. Plaintiff alleged that defendants' interest in the right of way was granted by the United States by statute in 1875 and that defendants had abandoned that right of way no later than October 3, 1988.

Section 912 provides, in part, and with exceptions not applicable here, that [w]henever public lands of the United States have been ... granted to any railroad company for use as a right of way for its railroad ...., and use and occupancy of said lands for such purposes has ceased ...., whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall ... be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad.... [FN4]

FN4. Under 16 U.S.C. § 1248(c), however, [c]ommencing upon October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in ... 43 U.S.C. [s] 912 ... shall remain in the United States upon the abandonment or forfeiture of such rights-of-way.... Because plaintiff seeks a determination that defendants abandoned their right of way prior to the effective date of § 1248(c), this statute is not relevant to the disposition of this appeal.

*1377 Pursuant to 28 U.S.C. § 1336(b), the district

court referred to the ICC the issue of whether defendants had abandoned the railroad line. The ICC determined that no abandonment had occurred because the ICC had never authorized defendants to abandon the line, as required under § 10903, which provides that "[a] rail carrier providing transportation subject to the jurisdiction of the [ICC] ... may ... abandon any part of its railroad lines ... only if the [ICC] finds that the present or future public convenience and necessity require or permit the abandonment ...." § 10903(d)(1).

Following the ICC's decision, the district court granted defendants summary judgment in the § 912 action, deferring to the ICC's determination that no abandonment could occur under § 912 until the ICC had authorized defendants, under § 10903, to abandon the railroad line. Phillips Co. v. Southern Pac. Rail Corp., 902 F.Supp. 1310, 1311-12 (D.Colo.1995). Plaintiff appeals the district court's decision.

This court reviews a summary judgment decision de novo, viewing the record in the light most favorable to the nonmoving party. Carl v. City of Overland Park, 65 F.3d 866, 868 (10th Cir.1995). Summary judgment is appropriate only if there are no genuinely disputed material issues of fact and the nonmoving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

The relevant statutory language does not clearly indicate the appropriate interplay between § 912 and § 10903. Where, as here, therefore, the statutory language is ambiguous, this court must defer to a reasonable interpretation of the statute by the agency responsible for its administration. National R.R. Passenger Corp. v. Boston &

Maine Corp., 503 U.S. 407, 417-18, 112 S.Ct. 1394, 1401-02, 118 L.Ed.2d 52 (1992)(citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). The ICC reasoned that its authorization was necessary, prior to a judicial determination of abandonment under § 912, in light of the agency's "exclusive and plenary ... authority over the abandonment of rail lines," citing Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981), and because, if de facto abandonment were sufficient to establish abandonment under § 912, a railroad could easily circumvent the ICC's oversight and regulation by simply terminating its use of a railroad line. Phillips Co., 902 F.Supp. at 1316-17. Because we cannot say that the agency's interpretation of the relationship between these statutes is unreasonable, we must defer to the ICC's determination.

Modern Handcraft, Inc.--Abandonment in Jackson County, Mo., 363 I.C.C. 969, 1981 WL 22670 (I.C.C.)(Aug. 19, 1981), is not to the contrary. In that case, a public transportation authority had initially attempted to obtain title to a railroad right of way through a state court condemnation action. Id. at *3 (citing Kansas City Area Transp. Auth. v. Ashley, 555 S.W.2d 9 (Mo.1977), cert. denied, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978)). The state supreme court balked, noting that the ICC had jurisdiction over the railroad as a common carrier and that legal abandonment of the rail line could be accomplished only pursuant to an ICC order. Id. The public transportation authority, along with the private landowners adjoining the right of way, then pursued a certificate from the ICC

authorizing abandonment, which the ICC granted after noting that the railroad had already ceased using the right of way for railroad purposes.

In Modern Handcraft, Inc., therefore, the third parties possessed a present reversionary interest in the right of way at issue, and were able to obtain the ICC's permission for the abandonment of the railroad based upon proof of a de facto abandonment and based upon the ICC's determination that present and future public convenience and necessity permitted the abandonment. In this case, on the other hand, plaintiff is hard pressed to assert a present reversionary interest in the right of way, in light of 16 U.S.C. § 1248(c), and instead seeks a retroactive determination that the right of way reverted to it prior to ***1378** the effective date of § 1248. The ICC has indicated, however, with no argument from plaintiff, that it has no authority to authorize, retroactively, the abandonment of a rail line. Appellant's App. at 189 (ICC indicated it does not "issue certificates authorizing abandonment as of a past date," citing § 10903(a)'s language requiring ICC to make findings of "present or future" public convenience and necessity in abandonment proceedings). Plaintiff's arguments relying upon Modern Handcraft, Inc., therefore, are unpersuasive.

[2] On appeal, plaintiff argues, for the first time, that this case must be remanded in light of the ICC's exemption from formal abandonment procedures, available for railroad lines that have been out of service for more than two years. See 49 C.F.R. § 1152.50. This argument fails, not only because plaintiff failed to raise this issue to the ICC, see Micheli v. Director, OWCP, 846 F.2d 632, 635 (10th Cir.1988), or the district court, see Lyons v. Jefferson Bank

& Trust, 994 F.2d 716, 721 (10th Cir.1993), but also because that exemption is expressly available only to railroads and is not self-executing. Exemption of Out of Service Rail Lines, 366 I.C.C. 885, 1983 WL 28009 (I.C.C.), at *4-5 (June 3, 1983); see also 49 C.F.R. § 1152.50(d).

The judgment of the United States District Court for the District of Colorado is AFFIRMED. Defendants' motion to file a surreply brief is DENIED as moot.

The PHILLIPS COMPANY, a Colorado Limited Partnership, Plaintiff,

v.

SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, The Denver and Rio Grande Western Railroad Company, Inc., a Delaware corporation, and Southern Pacific Transportation Company, a Delaware corporation, Defendants.

Civ. A. No. 93-Z-1461.
United States District Court,
D. Colorado.
Oct. 2, 1995.

902 F.Supp. 1310 (D. Colo. 1995)

Mobile home park owner brought action against railroad companies, claiming ownership to an allegedly abandoned portion of railroad right-of-way. After the Interstate Commerce Commission (ICC) rendered a decision on referred issue of when abandonment occurred, railroad companies moved for judgment on pleadings. The District Court, Weinshienk, J., held that abandonment could not occur without prior authorization by the ICC.

Motion granted.

[1] STATUTES k219(2)
361k219(2)
In reviewing agency's construction of statute within jurisdiction of that agency, court can look no further if intent of Congress is clear, for court as well as agency must give

effect to unambiguous intent of Congress; however, if the statute is silent or ambiguous with respect to specific issue, sole question for the court is whether agency's answer is based on permissible construction of the statute.

[1] STATUTES k219(4)
361k219(4)
In reviewing agency's construction of statute within jurisdiction of that agency, court can look no further if intent of Congress is clear, for court as well as agency must give effect to unambiguous intent of Congress; however, if the statute is silent or ambiguous with respect to specific issue, sole question for the court is whether agency's answer is based on permissible construction of the statute.

[2] COMMERCE k85.6
83k85.6
Under statute governing disposition of abandoned railroad grants, abandonment of railroad right-of-way may not occur without prior authorization by the Interstate Commerce Commission (ICC). 43 U.S.C.A. § 912; 49 U.S.C.A. § 10903.

[3] COMMERCE k161
83k161
In reviewing decision of the Interstate Commerce Commission (ICC), district court would not address challenging party's claim that its opponent submitted a false verified statement to the ICC, where the ICC decision did not rely on such statement.

[4] COMMERCE k99
83k99
Summary judgment granted to railroad companies in claimant's action to quiet title to an allegedly abandoned portion of railroad right-of-way, which judgment was based on holding that railroad right-of-way could not be abandoned without prior approval by the Interstate Commerce Commission (ICC), did not either preclude claimant from commencing a new ICC proceeding for decree of prospective abandonment or resolve any question as to claimant's standing to commence such proceeding. 43 U.S.C.A. § 912; 49 U.S.C.A. § 10903.

***1311** George Maurice Allen, Herbert S. Klein, Herbert S. Klein, P.C., Telluride, CO, for Phillips Co.

William D. Watson, John Robert Webb, Holme Roberts & Owen, LLC, Denver, CO, for Denver and Rio Grande Western Railroad Company, Southern Pacific Rail Corporation.

ORDER GRANTING SUMMARY JUDGMENT

WEINSHIENK, District Judge.

This case arises through plaintiff's claim against defendant The Denver and Rio Grande Western Railroad Company, Inc. ("D & RGW") under 43 U.S.C. § 912 ("Section 912") to ownership of a portion of D & RGW's railroad right-of- way as a result of an alleged abandonment. Plaintiff alleges that the abandonment occurred prior to October 4, 1988. The date of any abandonment is of importance because the provision of Section 912 under which plaintiff claims was amended effective October 4, 1988 by the passage of 16 U.S.C. 1248(c).

In August, 1993, D & RGW moved to dismiss plaintiff's complaint on the basis that the alleged abandonment could not have occurred without authorization by the Interstate Commerce Commission ("ICC") under 49 U.S.C. § 10903(a) ("Section 10903"), which D & RGW asserted had not been granted. Plaintiff has never asserted that the ICC authorized abandonment under Section 10903.

The Court referred that motion to United States Magistrate Judge Abram, who recommended that the case be dismissed. Rather than accepting that recommendation, the Court followed the suggestion of plaintiff and referred the issue of whether abandonment had occurred prior to October 4, 1988, to the ICC by Order dated January 4, 1994, pursuant to 28 U.S.C. § 1336(b). The Court referred this matter to the ICC because there was case law concerning railroad abandonment, particularly Allard Cattle Co. v. Colorado & S.R. Co., 33 Colo.App. 39, 516 P.2d 123 (1973), aff'd, 187 Colo. 1, 530 P.2d 503 (1974), in which the ICC was not mentioned.

Thereafter, the Phillips Company filed a document captioned Application for Abandonment with the ICC. After both procedural and substantive objections by the D & RGW to processing of the filing as an abandonment application, the ICC issued an Order on August 22, 1994, ordering that the Phillips Company's ICC filing be handled as a declaratory order matter, rather than as an adverse abandonment matter.

In response to the Court's referral, on April 4, 1995 the ICC issued a decision (the "ICC Decision", Finance Docket No. 32518). A copy of the ICC Decision is attached. Based on the ICC Decision, defendants [FN1] moved for

judgment on the pleadings. The Court treated the motion as a motion for summary judgment and has considered the parties' briefs, as well as oral argument presented on September 20, 1995.

FN1. Southern Pacific Rail Corporation and Southern Pacific Transportation Company have been added as defendants pursuant to plaintiff's Second Amended Complaint and Southern Pacific Transportation Company's Motion to Intervene. In the Second Amended Complaint, filed on March 30, 1995, the Court permitted the Plaintiff to allege a Class Action as to those parts of a 19 mile stretch of the D & RGW's Aspen Branch right of way between the Mid-Continent Loading Station near Carbondale, Colorado and the end of existing rails, near Woody Creek, Colorado as to which D & RGW's predecessor obtained a right of way under the 1875 General Railway Act. No class action proceedings have been conducted in this case and no class has been certified.

As the referring Court under 28 U.S.C. § 1336(b), this District Court has jurisdiction to review the ICC's decision (which is a Final Order of the ICC) under both 28 U.S.C. § 1336(b) and 28 U.S.C. § 1398(b).

The ICC has determined the issue of abandonment by stating clearly, "D & RG cannot be found to have abandoned the line under 43 U.S.C. 912 and 16 U.S.C. 1248(c). That is so because the commission has never exercised its authority at 49 U.S.C. 10903 to permit the abandonment." (ICC Decision, p. 4.) The ICC has written a very detailed decision drawing a bright line. The bright line is that abandonment under Section 912 could occur only

after ICC approval of abandonment under *1312 Section 10903. The ICC noted that Section 10903 and 16 U.S.C. § 1247(d), "reflect a Congressional policy of regulating the termination of service and the dismantling of right of way, a policy that would be jeopardized under Phillips' theory that de facto abandonment enables a court to authorize transfer of the line under 43 U.S.C. 912." (ICC Decision, p. 6.) The decision goes on to say that "Phillips' theory would in effect create a system of dual jurisdiction over abandonments for large segments of the nation's rail system under which anyone with a reversionary interest in railroad right of way could circumvent our jurisdiction by obtaining an abandonment ruling in a state or federal court. Indeed, under Phillips' theory, railroads could terminate their service obligation without our consent simply by ceasing service and getting a court to declare that the property reverted because service had been abandoned de facto." Id.

[1] Extensive case law prescribes that when a court reviews an agency's construction of a statute within the jurisdiction of that agency, it has to look first of all as to whether Congress had directly spoken to the precise issue. If the intent of Congress is clear, the court can look no further, for the court as well as the agency must give effect to the unambiguous intent of Congress. However, if the court determines that Congress has not addressed directly the precise question at issue, then the court does not impose its own construction of the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, the sole question for the court is whether the agency's answer is based on a permissible construction of the statute. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467

U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). The Tenth Circuit in Rubio-Rubio v. Immigration and Naturalization Service, recognized the heavy burden to show that an administrative agency reached "an impermissible construction." 23 F.3d 273, 276 (10th Cir.1994).

[2] The ICC has decided that the railroad property could not have been transferred to plaintiff under Section 912 before the ICC authorized abandonment of the line under Section 10903. Section 10903 is a statute within the jurisdiction of the ICC. Congress has not directly spoken to the interplay of Section 912 and Section 10903. This case is apparently one of first impression as to the interplay between the reversion provisions of 43 U.S.C. § 912 and those provisions of the Interstate Commerce Act providing for regulatory authority as to abandonment of rail service under 49 U.S.C. § 10903. The ICC bright line rule that abandonment under Section 912 cannot occur without ICC permission to abandon under Section 10903 is not arbitrary and capricious. The Court finds the ICC interpretation reasonable, and will defer to that reasonable interpretation.

[3] Plaintiff challenges the ICC decision by claiming that D & RGW submitted a false Verified Statement to the ICC. The Court notes that the language of the ICC's April 18, 1995 Order, under the heading "Issues Raised by the Parties" references a Verified Statement filed by a D & RGW witness as follows: "DRGW admits that rebuilding would be necessary to restore service but argues that Phillips has overstated the extent that would be required. DRGW witness James L. Ozment estimates that, based on observations made in July 1993, an expenditure of $30,000

could repair the line between Mid Continent and Woody Creek for minimal freight service." The court need not address this claim because the ICC Decision does not rely on this Verified Statement or, for that matter, any other factual issue beyond the undisputed fact that the ICC has not authorized abandonment.

[4] Plaintiff also complains that the ICC improperly treated the referral as a declaratory rather than an abandonment proceeding. The Court finds the ICC Decision resolves the issue referred by the Court. Nothing in this Order either precludes plaintiff from commencing a new ICC proceeding for a decree of prospective abandonment under Section 10903 or resolves any question as to plaintiff's standing to commence such a proceeding.

Accepting the ICC analysis of the interplay of Section 912 and Section 10903, the ***1313** Court will grant defendants' motion for summary judgment.

ACCORDINGLY, it is ordered that:

1. Defendants' Motion for Judgment on the Pleadings, heard by this Court as a motion for summary judgment, is granted.

2. Plaintiff's complaint in this matter is dismissed with prejudice.

3. This order is stayed until October 1, 1995.

4. Each party shall bear its own costs.

APPENDIX

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 32518

THE PHILLIPS COMPANY--PETITION FOR DECLARATORY ORDER

Decided: April 4, 1995

We find that the Denver & Rio Grande Western Railroad Company (DRGW) has not obtained Commission approval under 49 U.S.C. 10903 to abandon its Aspen Branch line and that an abandonment may not take place without that approval. As a result, we need not reach the issue referred to us of whether DRGW abandoned service de facto before October 4, 1988, within the meaning of 16 U.S.C. 1248(c) and 43 U.S.C. 912.

BACKGROUND

The Phillips Company of Pitkin County, CO (Phillips) owns and operates a mobile home park adjacent to DRGW's Aspen Branch line. The Aspen Branch line extends in a southeast direction from its main line connection at milepost 360.10 at Glenwood Springs, CO, to milepost 393.66 at Woody Creek, CO. Phillips' property is at milepost 390. A 7.895-mile segment of the line from Woody Creek to Aspen was abandoned in 1968.

In 1992, DRGW discovered that Phillips' mobile home park had encroached upon a portion of its right-of-way. In an attempt to quiet title, Phillips filed a complaint in a Federal district court on July 12, 1993, asking the court to find that the railroad had abandoned the line and to declare that title to the right-of-way reverts to Phillips under 43 U.S.C. 912. [FN1] Under this provision, when a court decrees that a railroad right-of-way is no longer used and occupied for railroad purposes, title to the land passes to the adjacent landowner.

FN1. The complaint was docketed as Phillips Co. v. Denver and Rio Grande Western R.R., No. 93-Z-1461

(D.Colo. filed July 12, 1993).

Phillips admitted in court that the reverter provision of 43 U.S.C. 912 has been superseded by a 1988 amendment to the National Trails System Act providing that, for abandonments after October 4, 1988, title reverts to the United States. See 16 U.S.C. 1248(c). But Phillips argued that section 1248(c) does not apply here on the grounds that the right-of-way was fully abandoned by 1985.

DRGW moved to dismiss the complaint, arguing that the court lacks jurisdiction to find that the line was abandoned because only the Interstate Commerce Commission may determine whether a railroad right-of-way has been abandoned. The court denied the motion, finding that it could grant the relief sought by Phillips under 43 U.S.C. 912. In making this finding, the court rejected a magistrate's recommendation to dismiss on the grounds that the Commission has not approved abandonment. Notwithstanding the Commission's lack of approval of any abandonment, the court referred to the Commission the purely factual issue of whether rail use had ceased before October 4, 1988.

On May 3, 1994, Phillips responded to the court's referral order by filing a pleading with the Commission entitled "Application For Determination Of Abandonment," asking this agency to find that DRGW, by 1985, had abandoned service over a segment of its Aspen Branch between milepost 375, near Carbondale, CO, to milepost 392, near Woody Creek, CO, a distance of approximately 17.5 miles, in Garfield, Eagle and Pitkin Counties, CO. DRGW replied in opposition to the relief sought by Phillips.

*1314 In our decision served August 26, 1994, we commenced a declaratory order proceeding and requested comments. [FN2] On September 26, 1994, DRGW and Phillips filed comments.

FN2. This proceeding was originally docketed as Docket No. AB-8 (Sub-No. 28), The Phillips Company--Abandonment--A Line of the Denver & Rio Grande Western Railroad Company and identified as a "third party" abandonment application, i.e., one filed by a party other than the railroad owning the line that is the subject of the application. In our decision served August 26, 1994, we found that this proceeding was not intended to be, and could not be considered, an abandonment application. We ordered that it be processed as a petition for declaratory order under the current docket number.

ISSUES RAISED BY THE PARTIES

The parties disagree over whether we have the authority to resolve the purely factual issue raised by Phillips (whether the line ceased to be used for rail purposes no later than October 4, 1988) even if this agency has never approved abandonment of the line. Anticipating that we may determine that we have the authority to resolve this issue, both parties submit evidence on whether the line ceased to be used for rail purposes before October 4, 1988.

Jurisdiction To Make The Finding Requested By Phillips

Renewing its position in court, DRGW argues that the Commission has never authorized abandonment of the line and that resolution of the issue raised by Phillips could undermine our jurisdiction over abandonment of service by

enabling the court to transfer the property to Phillips before abandonment of service is authorized by this agency. DRGW urges us not only to avoid determining whether rail use ceased de facto before October 4, 1988, but also to hold that as a matter of law the right-of-way may not revert under 43 U.S.C. 912 until we authorize abandonment of the line.

Citing cases that it raised before the court, Phillips supports the court's finding that it can order reversion of the right-of-way to Phillips under 43 U.S.C. 912 if the right-of-way has been abandoned de facto, even though the Commission might not have authorized abandonment under the Interstate Commerce Act.

The Issue of Whether the Line Was Abandoned in Fact if Not in Law

The parties also dispute whether the line was in fact, if not by law, abandoned before October 4, 1988. Phillips submits affidavits from persons stating that service to the end of the line at Woody Creek terminated before 1988, that the track was graded or had deteriorated before 1988, and that trains had ceased moving over the track before 1988. In its initial filing of May 3, 1994, Phillips submits two engineering surveys of the line purporting to show that the line was dilapidated as of the dates of the reports (February 3, 1993 and August 12, 1993). In its initial filing of May 3, 1994, Phillips also supports its position that there has been an abandonment by submitting eight photographs of different portions of the right-of-way, taken on July 12, 1993.

DRGW concedes that the sole shipper at the eastern end of the line at Woody Creek, the Pitkin Iron Corporation, ceased mining operations in 1982. But the railroad asserts

that shipments from this mine continued until 1985 or 1986. DRGW is unable to verify the date of the last shipment. The railroad argues, however, that shipments from this location were at least anticipated as late a§ 1985 or 1986, even if they did not actually occur. In this regard, DRGW points to what the carrier purports to be a summary of a February 7, 1985 extension to a shipping contract. [FN3]

FN3. See exhibit 7 of DRGW's comments filed September 26, 1994.

DRGW does not point to any other source of post-October 4, 1988 traffic on the segment sought by Phillips to be declared abandoned. [FN4] The carrier asserts that there are ***1315** currently two active shippers on the Aspen Branch, a beer distributor at milepost 365 near Glenwood Springs and a chemical shipper at milepost 373.0 (Carbondale). Neither of these shippers is on the segment claimed by Phillips to have been abandoned (between milepost 375 and 392), however. DRGW asserts that there was a shipper at Mid Continent (milepost 375.0) until 1992, Mid Continent Resources, Inc., on the far western end of the segment claimed to have been abandoned by Phillips.

FN4. DRGW asserts that it has been storing two private railroad cars on siding near Woody Creek since 1983 under a lease that is active and in good standing. In exhibit 13 of DRGW's comments filed September 26, 1994, S.C. Gordon, one of the carrier's property managers, attests to the existence of this lease but does not provide a copy.

DRGW admits that rebuilding would be necessary to restore service but argues that Phillips has overstated the extent that would be required. DRGW witness James L. Ozment estimates that, based on observations made in July 1993, an expenditure of $30,000 could repair the line between Mid Continent and Woody Creek for minimal freight service. [FN5] DRGW witness Daniel I. O'Callaghan states that, based on a tour of the track in October 1992, the track could be made suitable for passage of a locomotive, rail plow, and work train if two bridges were repaired. He estimated the cost of those repairs at $26,600. [FN6] Arguing that Phillips' photographs of the track are unrepresentative of the condition of the track, DRGW submits 13 photographs of the entire Aspen Branch. [FN7]

FN5. Exhibit 9 of DRGW's comments filed September 26, 1994.

FN6. Exhibit 10 of DRGW's comments filed September 26, 1994.

FN7. Exhibit 8 of DRGW's comments filed September 26, 1994. This exhibit includes two photographs of an abandoned portion below Woody Creek. The exhibit was not sponsored by a witness, but it was accompanied by a map showing the location of the photographs.

DRGW also argues that, notwithstanding the lack of traffic on the line and its poor condition, it stands ready to fulfill its common carrier obligation to provide service if it

is requested. The carrier points to its retention of tariffs applicable to stations on the line.

Finally, DRGW asserts that the line has always been classed and treated as operating railroad property on its own books, by the State of Colorado, and by Pitkin County.

DISCUSSION AND CONCLUSIONS

DRGW cannot be found to have "abandoned" the line under 43 U.S.C. 912 and 16 U.S.C. 1248(c). That is so because the Commission has never exercised its authority at 49 U.S.C. 10903 to permit the abandonment.

Phillips improperly relies on cases that were decided before the Commission was authorized to regulate the abandonment of railroad lines in 1920. [FN8] These cases do not apply because Phillips is not claiming that rail service ceased before the Commission was given authority to regulate abandonments.

FN8. In this category of cases are: Northern Pacific Ry. v. Townsend, 190 U.S. 267 [23 S.Ct. 671, 47 L.Ed. 1044] (1903); Denver & Rio Grande Ry. v. Mills, 222 F. 481 (8th Cir.1915); McClain v. Chicago & N.W. Ry., [90 Iowa 646] 57 N.W. 594 (1894); Missouri Pac. Ry. v. Bradbury, [106 Mo.App. 450] 79 S.W. 966 (1904); New York, N.H. & H. R.R. v. Benedict, [169 Mass. 262] 47 N.E. 1027 (1897); Home Real Estate Co. v. Los Angeles Pac. Co., [163 Cal. 710] 126 P. 972 (1912); and Atlanta & Charlotte Air Line Ry. v. City of Easley, [117 S.C. 494] 109 S.E. 285 (1921) (Easley). While the decision in Easley was not reached until 1921, the disputed portion of the right-of-way had been used as a public street for 39 years before the Commission was authorized to regulate abandonments.

Phillips also relies on cases where abandonment authority was either obtained or not required prior to the court litigation. [FN9] Here, abandonment authority is necessary under 49 U.S.C. 10903 and has never been obtained for the Aspen Branch. Thus, these cases do not establish that the Aspen Branch can be abandoned without prior Commission approval.

FN9. In this category of cases are: Idaho v. Oregon Short Line R.R., 617 F.Supp. 213 (D.Idaho 1985); Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (9th Cir.1990); and Marshall v. Chicago & North Western [Northwestern] Transp. Co., 826 F.Supp. 1310 (D.Wyo.1992), aff'd 30 [31] F.3d 1028 (10th Cir.1994).

Phillips cites Oklahoma City--Ada--Atoka Ry. Co. v. City of Ada, 182 F.2d 293 (10th Cir.1950). There, the court upheld a trial court's finding that right-of-way reverted to the City of Ada under a statute governing the disposition of land in American Indian ***1316** territory when the land ceased to be used for railroad purposes. [FN10] The right-of-way consisted of a tracked and an untracked portion. 182 F.2d at 295. The court noted that the right-of-way was listed as railroad property in the carrier's annual report to the Commission, but the court approved the reversion anyway, finding (at 295):

FN10. See An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes, 34 Stat. 137, 142 (April 26, 1906).

Appellant does not contend that it is using the right of way for railway purposes. Indeed, it has never attempted to use the untracked portion of its right of way for such purposes, and has ceased to use the graded and tracked portion for any purpose since 1935.

We do not view this case as controlling precedent. The issue of the effect of our continued jurisdiction over the right-of-way in the absence of an approved abandonment was not discussed in the decision and does not appear to have been raised by the parties. In any event, the result is an aberration among the overwhelming weight of authority squarely upholding our exclusive and plenary jurisdiction over the abandonment of right-of-way. We view this case as having been wrongly decided and urge the court not to follow it in disposing of the case brought by Phillips.

Phillips also cites Ocean Shore R.R. v. Doelger, [179 Cal.App.2d 222] 3 Cal.Rptr. 706 (1960). There, a court upheld a lower court's judgment that railroad right-of-way passed to a reversionary owner on the grounds that it had been abandoned. The court did not rule on a definitive date for the abandonment, but the decision made it clear that it took place at some time after February 1921. The court did not discuss the jurisdiction of the Interstate Commerce Commission or even mention the existence this agency. Moreover, it is not even clear that the railroad was subject to the jurisdiction of the Commission, for it was an intrastate railroad handling traffic subject to the jurisdiction of the California Railroad Commission, which allowed the carrier to end service during 1920 or 1921. In any event, even if the line was subject to our jurisdiction and the issue of our jurisdiction had been raised, this decision, issued by an

intermediate state court whose interpretation of federal law is not final, does not outweigh the considerable authority supporting our exclusive and plenary jurisdiction over the abandonment of rail lines.

The courts have long recognized the exclusive and plenary nature of the Commission's authority over the abandonment of rail lines. For example, in Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 [101 S.Ct. 1124, 67 L.Ed.2d 258] (1981) (Kalo Brick), the Supreme Court held that a shipper could not recover common law damages for abandonment of service in a state court because the Commission has exclusive jurisdiction over abandonment of service. Discussing 49 U.S.C. 10903, which governs the Commission's abandonment jurisdiction, the Court stated (450 U.S. at 320 [101 S.Ct. at 1131]): This section, we have said, must be "construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." [Citation omitted.] Among those evils is "[m]ultiple control in respect of matters affecting [interstate railroad] transportation," because such control, in the judgment of Congress, has proved "detrimental to the public interest." [Citation omitted.] The Court went on to reason (450 U.S. at 321 [101 S.Ct. at 1132]): "The breadth of the Commission's statutory discretion suggests a Congressional intent to limit interference with the agency's work." [FN11]

FN11. Accord, Thompson v. Texas Mexican Ry., 328 U.S. 134 [66 S.Ct. 937, 90 L.Ed. 1132] (1946); Hayfield Northern R.R. v. Chicago & N.W. Transportation

Co., 467 U.S. 622 [104 S.Ct. 2610, 81 L.Ed.2d 527] (1984).

Our jurisdiction over abandonments under 49 U.S.C. 10903 was enacted in order to prevent railroads from discontinuing service at will and thereafter either selling the right-of-way for nonrail use or allowing the right-of-way to pass to reversionary owners. Even ***1317** if the Commission were to approve the abandonment of the Aspen Branch, the property could not revert to Phillips if the right-of-way were to be converted for use as a trail and banked for future rail use pursuant to section 8(d) the National Trails System Act, 16 U.S.C. 1247(d). See Preseault v. I.C.C., 494 U.S. 1 [110 S.Ct. 914, 108 L.Ed.2d 1] (1990), upholding the constitutionality of this provision. The clear intent of these statutory provisions was to suspend the rights of reversionary owners under state law as long as the rights-of-way remain subject to our jurisdiction. [FN12] These statutory provisions reflect a Congressional policy of regulating the termination of service and the dismantling of right- of-way, a policy that would be jeopardized under Phillips' theory that de facto abandonment enables a court to authorize transfer of the line under 43 U.S.C. 912.

FN12. See e.g., Trustees of the Diocese of Vermont v. Vermont, [145 Vt. 510], 496 A.2d 151 (Vermont 1985), where the court, citing Kalo Brick, supra, dismissed an action to extinguish a railroad easement over a line where actual rail service had ended, finding that such an action could not lie because the Interstate Commerce Commission had not approved abandonment.

We find no grounds for concluding that Congress intended to grant reversionary rights recognized under 43 U.S.C. 912 a broader right to vest for track remaining under our jurisdiction than reversionary rights recognized under state law. In the absence of clear legislative history or definitive case law to the contrary, we are most reluctant to come to such a conclusion. Phillips' theory would in effect create a system of dual jurisdiction over abandonments for large segments of the Nation's rail system, under which anyone with a reversionary interest in railroad right-of-way could circumvent our jurisdiction by obtaining an abandonment ruling in a state or federal court. Indeed, under Phillips' theory, railroads could terminate their service obligation without our consent simply by ceasing service and getting a court to declare that the property reverted because service had been abandoned de facto.

In light of our finding that the property may not be transferred to Phillips under 43 U.S.C. 912 before we authorize abandonment of the line, we need not resolve the purely factual issue raised by Phillips and referred to us by the court, i.e., whether DRGW ceased to use the right-of-way for rail purposes at least by October 4, 1988. Moreover, it is our view that the court is not able to find a de facto abandonment in the absence of Commission permission for the carrier lawfully to abandon service. Thus, we do not reach the issue of whether there was a de facto abandonment of the line before October 4, 1988.

On March 10, 1995, Phillips filed a petition to submit additional evidence. Phillips tendered documents designed to show that rail service was in fact terminated before 1988 and is incapable of being revived. Phillips

claims that the documents are relevant and were not available when its brief was filed on September 23, 1994.

We will deny admission of these documents. As explained above, we cannot resolve the factual issue with which these documents attempt to deal, namely, whether rail use ceased de facto before 1988. The Commission has not approved the abandonment of property, and that is the only legally relevant consideration. Thus, the documents are not relevant.

Moreover, Phillips has not provided good cause for an extension of time to file additional evidence. See 49 CFR 1104.6 and 1104.7. The study prepared for the Colorado Department of Transportation was dated "August 1994." Phillips does not explain why this study was not filed until March 10, 1995. Also tendered is a December 22, 1994 letter to Phillips' attorney by a consultant stating that he reviewed certain photographs taken on June 27, 1984, that allegedly show that there is a landslide covering an 85-foot portion of the track. Phillips provides no explanation of why the consultant's opinion was not procured and submitted earlier.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

***1318** 1. Phillips' motion to admit additional evidence filed March 10, 1995, is denied.

2. This proceeding is discontinued.

3. This decision is effective on April 18, 1995.

4. A copy of the decision will be served on the parties and on the referring court: United States District

Court District of Colorado U.S. Court House 1929 Stout Street Denver, CO 80294 Re: No. 93-Z-1461

By the Commission, Chairman McDonald, Vice Chairman Morgan, and Commissioners Simmons and Owen. Vernon A. Williams Secretary

(SEAL)

43 U.S.C. § 912. Disposition of abandoned or forfeited railroad grants

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: Provided, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment

be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

Supreme Court, U.S.
FILED
MAY 21 1997
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No. 96-1672

In The

Supreme Court of the United States

October Term, 1996

THE PHILLIPS COMPANY,
a Colorado Limited Partnership,

Petitioner,

v.

SOUTHERN PACIFIC RAIL CORPORATION, a Delaware corporation, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INC., a Delaware corporation, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's "questions presented" do not reflect the holdings or rationale of either the District Court or the Tenth Circuit. This case presents a single issue:

> Does 43 U.S.C. § 912 empower a District Court to declare an involuntary abandonment of a federally granted railroad right-of-way without the ICC permission required under 49 U.S.C. § 10903(a) for the termination of rail service over the right-of-way?

There is no reason for this Court to review the decisions of the Interstate Commerce Commission (the "ICC"),[1] the District Court and the Tenth Circuit Court of Appeals that one federal statute should not be interpreted to defeat the exclusive and plenary jurisdiction granted to the ICC under another.

---

[1] The ICC was abolished by the ICC Termination Act of 1995 effective January 1, 1996, and its authority under 49 U.S.C. § 10903(a) transferred to the Surface Transportation Board. Because the ICC was in existence at all times relevant to this case, the ICC is referred to in this brief in the present tense and the transfer of authority ignored.

LIST OF PARTIES

The Petition does not name all the parties and misstates the relationships of respondents.

Southern Pacific Transportation Company ("SP Trans") became a defendant when the District Court granted its petition to intervene by Minute Order dated June 7, 1995 (Aplt. App. at 31). During the proceedings below, the Denver and Rio Grande Western Railroad Company, Inc. ("D&RGW") was a wholly owned subsidiary of SP Trans, which in turn was a wholly owned subsidiary of Southern Pacific Rail Corporation, a Delaware corporation. Subsequent to the proceedings below, Southern Pacific Rail Corporation was merged into UP Holding Company, Inc., a Utah corporation. Following that merger, UP Holding Company, Inc. changed its name to Southern Pacific Rail Corporation. Southern Pacific Rail Corporation, a Utah corporation, is successor in interest to Southern Pacific Rail Corporation, a Delaware corporation, named as a defendant in this case.

Respondents are now all wholly owned subsidiaries of Union Pacific Corporation, a publicly traded corporation. To the extent petitioner's description of the corporate history of respondents is different than set forth above, it is wrong and unsupported by the record.

Respondents have the following non-wholly owned subsidiaries: Central California Traction Company; Denver Union Terminal Railway Co.; The Ogden Union Railway & Depot Co.; Portland Terminal Railroad Company; Portland Traction Company; San Marco Pipeline

LIST OF PARTIES – Continued

Company; St. Louis Southwestern Railway Co.; Sunset Railway Company; TTX Company.

The Phillips Company is a Colorado limited partnership that appears to own land adjacent to the right-of-way in dispute. The record in this case does not confirm the additional information about The Phillips Company offered by petitioner.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

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43 U.S.C. § 912 (Section 912) ..... *passim*

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OPINIONS BELOW

Petitioner includes the text of 43 U.S.C. § 912 ("Section 912") in the Appendix to its petition. Petitioner did not include the text of 16 U.S.C. § 1248(c) that amended Section 912 effective October 4, 1988 to remove the provision under which petitioner claims. The text of 16 U.S.C. § 1248(c) is Appendix A to this brief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The General Railroad Right-of-Way Act of 1875 (43 U.S.C. § 934-§ 939) (the "1875 Act"), Section 912, 16 U.S.C. § 1248(c) and 49 U.S.C. § 10903(a) ("Section 10903") are relevant to this case.

The Fifth Amendment to the United States Constitution is not relevant to this case. No private property has been taken for public use. Petitioner made no claim for compensation under the Fifth Amendment in any proceeding below.

16 U.S.C. § 1247(d) is not relevant to this case. No action affecting the right-of-way in question has been taken under 16 U.S.C. § 1247(d).

STATEMENT OF THE CASE

The ICC, the District Court and the Tenth Circuit have all ruled, without reaching any other factual allegation advanced by petitioner, that when a railroad lacks the required regulatory permission under Section 10903

to cease rail service permanently, Section 912 cannot be interpreted to terminate involuntarily an 1875 Act right-of-way that is necessary to provide that rail service. Respect for the ICC's broad jurisdiction to protect the public demands this outcome.

It is undisputed in this case that the right-of-way at issue was granted under the 1875 Act, that petitioner's claim is based on the provisions of Section 912 and that the rail lines over the right-of-way in question are subject to ICC jurisdiction. It is also undisputed that the ICC has never granted permission under Section 10903 to terminate rail service over the subject right-of-way. The decision of the Tenth Circuit that petitioner asks this Court to review, and the underlying decisions of the ICC and the District Court which the Tenth Circuit upheld, are all based upon those four undisputed facts.

Portions of petitioner's statement of the case are correct. In 1993 petitioner filed an action in the District Court seeking a declaration under Section 912 that a portion of the 1875 Act right-of-way for the Aspen Branch had been abandoned and a declaration that the abandoned portion of the right-of-way belonged to petitioner. (Aplt. App. at 35) Petitioner amended its pleading to expand the portion of the Aspen Branch to which its claim related and to seek certification of a plaintiff class of similarly situated adjacent landowners. (Aplt. App. at 4) Although the District Court allowed the amendment to describe a plaintiff class, no further action concerning class certification occurred prior to the District Court's dismissal of petitioner's claim by summary judgment.

Petitioner did not commence an adverse abandonment proceeding before the ICC. In petitioner's Written Objection to the Magistrate Judge's recommendation that petitioner's claim be dismissed because the ICC had never granted permission to cease service, petitioner suggested that the "issues of abandonment" be referred to the ICC. (Supp. App. at 9) The District Court accepted petitioner's suggestion (Aplt. App. at 136) and in response to the District Court's order of referral, petitioner filed a document captioned "Application for Determination of Abandonment" with the ICC. (Aplt. App. at 139)

Petitioner's filing with the ICC cited the District Court's order of referral, but incorporated substantial portions of the form of petition used to initiate a request for abandonment subject to the exclusive jurisdiction of the ICC under Section 10903. The ICC docketed petitioner's filing as a declaratory order proceeding, as is its procedure. (Aplt. App. at 188). Petitioner never challenged or appealed the ICC's docketing of petitioner's filing as a request for declaratory order. Petitioner should not be heard now to complain about a procedural issue on which petitioner was silent below.

In the declaratory/referral proceeding, the ICC decided, on April 4, 1995, that the D&RGW had not obtained ICC approval under Section 10903 to terminate service and that, without such permission, an abandonment could not take place. (Aplt. App. at 363) The ICC also decided that, because an abandonment could not take place without its permission under Section 10903, it need not consider facts that petitioner alleged indicated abandonment before October 4, 1988.

By Order dated October 2, 1995, the District Court reviewed the ICC decision, adopted the ICC analysis and granted respondents' motion for summary judgment.

The Tenth Circuit decision dated October 16, 1996 approves the interpretation of the ICC and affirms the District Court holding that an abandonment cannot occur under Section 912 without prior ICC permission under Section 10903. The Tenth Circuit also recognized that the amendment to Section 912 eliminated petitioner's expectation of receiving a real estate interest that might revert to the United States by explaining that petitioner would be "hard pressed to assert a present revisionary interest in the right-of-way, in light of 16 U.S.C. § 1248(c)." (Petition Appendix at 19)

The request of petitioner, and others, to reopen the ICC referral proceeding as an adverse abandonment proceeding was denied on February 14, 1997. Finance Docket No. 32518, *The Phillips Company – Petition for Declaratory Order*, STB February 25, 1997. That denial has not been appealed.

REASONS FOR DENYING THE WRIT

The Tenth Circuit's decision in this case neither suggests a split between the Tenth Circuit and other Courts of Appeal nor raises any important question of law. The Tenth Circuit's decision is consistent with a long series of federal and state court decisions concerning the relationship between railroad abandonment of their rights-of-way and pervasive ICC jurisdiction over railroad service. Due to changes in Section 912, the decision has limited

precedential significance. Petitioner's factual assertions, though numerous, are irrelevant to the decision below.

I. There Is No Circuit Court Conflict Between the Tenth Circuit Decision and *Preseault v. United States*

Contrary to petitioner's assertion, the decision of the Tenth Circuit in this case is not in conflict with the decision of the Court of Appeals for the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault 96*"). *Preseault 96* arose from different circumstances and addressed different issues.

Preseault 96 arose out of a series of proceedings that includes a "no abandonment" decision to the same effect as the decisions below in this case. In *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151 (1985), the Supreme Court of Vermont held that a court could not declare the right-of-way at issue in *Preseault 96* terminated prior to ICC regulatory permission to cease rail service.

Preseault 96 is a review of a two-part decision of the Court of Federal Claims. In the first paragraph of its second decision, the trial court explained that its initial decision that abandonment had occurred was based on "applying only Vermont common law, without giving federal law, or the relationship of state and federal law any effect." *Preseault v. U.S.*, 27 Fed. Cl. 69 at 71 (1992). A decision that there would have been an abandonment without regard to federal law giving the ICC exclusive jurisdiction is not in conflict with either the decision of the Vermont Supreme Court in the same dispute that the

federal law assumed away by the Court of Claims prevented an abandonment or the decision of the Tenth Circuit in this case to the same effect.

Preseault 96 arose *after* a request to the ICC under Section 10903 that led to rail banking. In this case, no request to the ICC under Section 10903 has ever been made. Based on the theory that adjacent owners lost property rights as a result of rail banking, *Preseault 96* considered a claim for compensation against the United States – a "takings" case. The *Preseault 96* opinion begins with the phrase "[i]n this Takings case." (100 F.3d 1525 at 1529) Although petitioner now alludes to seeking compensation from the United States, that claim was not made in the case below, and no takings issue is available for review in this case.

Thus, *Preseault 96* involves the impact of federal regulation over railroads on a vested, common law property right. This case denies a claim to enforce an expectancy of obtaining a property right under a federal statute that was amended to delete the basis for the claim before the claim was made. This case is an interpretation of Section 912. *Preseault 96* says nothing about the interpretation of Section 912.

Section 912 never conveyed any property right to adjoining landowners. Section 912 was a statutory system for disposing of the property interest of the United States *after* abandonment by a railroad and reversion of the right-of-way to the United States had occurred. The expectation of an adjacent landowner under Section 912 was always subordinate to the prior statutory expectations of a municipality; to use for a "public highway" for

up to a year after a court decree under Section 912; and to any conveyance of the right-of-way validated or confirmed by Congress.

Like any statutory prospect of future benefit, the expectation of an adjacent landowner under Section 912 was also subject to elimination by amendment or repeal of the statute. Congress did precisely that effective October 4, 1988. By 16 U.S.C. § 1248(c), Congress repealed the portion of Section 912 under which petitioner could have received property from the United States, after abandonment and an appropriate court decree. Unlike *Preseault*, which dealt with the consequence of extinction of an established common law property right, in this case no property right was taken from petitioner in the Aspen Branch right-of-way because petitioner never received any property in the first place.

II. There Is No Significant Precedent In This Case Because of the 1988 Change to Section 912

Petitioner's suggestion that the case below raises issues of significance to "hundreds of [sic] not thousands" (Petition at 8) of other landowners is incorrect. Future abandonments cannot put anyone in the same circumstance as petitioner because of the repeal of the portion of Section 912 under which petitioner claims. No abandonment after October 4, 1988 can raise the Section 912 interpretation question that is the sole issue in this case.

Nothing supports petitioner's suggestion that a significant number of claims based on abandonment of federal rights-of-way before October 4, 1988 will suddenly

spring up after having lain unasserted for eight and a half years. Common sense suggests otherwise. Moreover, any such claims could well be time-barred.

III. Ample Precedent Supports the Tenth Circuit's Decision

At all times relevant to this case, Section 10903 said that a railroad may "(1) abandon any part of its railroad lines; or (2) discontinue the operation of all rail transportation over any part of its railroad lines; *only* if the [ICC] finds that the present or future public convenience and necessity require or permit the abandonment." (emphasis added) This Court recognized the exclusive and plenary authority of the ICC over abandonment of "railroad lines" in *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). There, this Court referred to the Interstate Commerce Act as "among the most pervasive and comprehensive of federal regulatory schemes," *id.* at 318, and held that the exclusive and plenary nature of the ICC's authority to rule on abandonment "is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." *Id.* at 321.

Respondents cited several decisions recognizing that the ICC's exclusive and plenary authority prevents abandonment of a railroad right-of-way without ICC permission under Section 10903 to cease regulated rail service. *City of Des Moines v. Chicago and North Western Railway Co.*, 159 F. Supp. 223 (S.D. Iowa 1958); *Mobile & Gulf R.R. Co. v. Crocker*, 455 So.2d 829 (Ala. 1984); *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.3d 9 (Mo. 1977);

Trustees of the Diocese of Vermont v. State, 496 A.2d 151 (Vt. 1985); *State of Vermont and Vermont Railway, Inc.*, 3 I.C.C.2d 903 (1987). Petitioner cited only cases where abandonment occurred after ICC permission, though in some of those cases the ICC permission was not discussed in the published opinion but could be found at the ICC. Petitioner cited below, and now cites, no case holding that a right-of-way for rail service subject to ICC jurisdiction can be abandoned by its railroad owner without ICC permission to terminate rail service.

In *Preseault v. ICC*, 494 U.S. 1 (1990) this Court noted that state law governing the disposition of reversionary interests in railroad rights-of-way was "subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments." *Id.* at 8 citing *Kalo*. In this case, the ICC, the District Court and the Tenth Circuit have merely applied the same "subject to" limitation when interpreting Section 912.

IV. This Court Should Not Consider Irrelevant and Unsubstantiated Factual Assertions Set Forth in the Petition

The proceedings below never resolved any of the disputed factual issues necessary for a court to infer that "use and occupancy" of the right-of-way for railroad purposes had ceased, despite respondents' denial of abandonment. The decisions of the ICC, the District Court and the Tenth Circuit are all based upon a single and undisputed factual determination: ICC permission to terminate service had never been granted. While the record in the proceedings below includes some evidence

properly presented by affidavit, the bulk of the "evidence" referred to in the petition consists only of petitioner's unsupported assertions or uncertified written materials attached to petitioner's pleadings and never authenticated as required by Rule 56(e), F.R. Civ.P.

The petition does not identify where the factual assertions made in the petition are found in the record. It even includes many statements of fact that could not have been in the record below because the "facts" asserted occurred (if at all) *after* the case had been decided. For example, the reference to a contract to sell the Aspen Branch and to a state court proceeding to prevent that sale are not supported in the record because both occurred after the District Court entered summary judgment. (Petition at 2) Petitioner's discussion of future plans for the right-of-way (Petition at 8) are irrelevant to the decisions in this case and have no support in the record below.

Petitioner's assertion that neither the ICC nor the District Court has adjudicated the facts concerning abandonment under either Section 912 or Section 10903 ignores the basis and clear language of both decisions. The ICC made the *factual* determination that the ICC had not granted approval under Section 10903 to abandon the Aspen Branch. That decision appears in the first paragraph of the ICC's decision. (Aplt. App. at 363) The ICC properly concluded that the fact that the ICC has not approved the abandonment of the right-of-way was "the only legally relevant consideration." (Aplt. App. at 368)

The "factual development" referred to in footnote 1 of the petition is irrelevant to the petition. Respondents

deny intending to abandon the right-of-way, deny that the condition of the right-of-way is sufficient to infer an intention to abandon and contend that the right-of-way has been used continuously for railroad purposes within the meaning of the 1875 Act and Section 912. Those contentions, and petitioner's counter-contentions, have not been tested below, because they are unnecessary to the decisions below.

The decisions of the ICC, the District Court and the Tenth Circuit merely hold that until the ICC has granted permission to cease rail service over a right-of-way under Section 10903, a court cannot declare that the right-of-way has been abandoned under Section 912. The exclusive jurisdiction of the ICC to protect the public by deciding if railroads should be allowed to cease service permanently would be eviscerated if railroads could voluntarily surrender, or be involuntarily stripped of, the rights-of-way necessary to continue the service before and without concern for ICC action.

CONCLUSION

For the reasons presented above, respondents request that the Court deny certiorari.

Respectfully submitted,

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APPENDIX A

16 U.S.C. § 1248(c)

(c) **Abandoned railroad grants; retention of rights**

Commencing upon October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in the Act of March 8, 1922 (43 U.S.C. 912), shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.